IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 6 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE A.R.DAVE
and
Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

COMMISSIONER OF INCOME-TAX

Versus

ELECTRIC CONTROL GEAR LTD.

Appearance:

1. INCOME TAX REFERENCE No. 6 of 1989
MR BB NAYAK for Petitioner
NOTICE SERVED for Respondent

CORAM : MR.JUSTICE A.R.DAVE
and
MR.JUSTICE K.M.MEHTA

Date of decision: 21/11/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE A.R.DAVE)

At the instance of the revenue, the following questions have been referred to this court for its opinion by the Income Tax Appellate Tribunal Ahmedaad Bench 'B' under the provisions of sec. 256(1) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act'):

1. Whether, on the facts and in the circumstances of the case, and particularly when the assessee had agreed that depreciation claim will not be allowed for the period of 5 months, i.e. for the assessment year 1982-83, it was open to the assessee to claim depreciation on the ground that the condition imposed was illegal?

2. Whether, when in view of changing the accounting period, a condition was imposed by the ITO and accepted by the assessee it was open to the assessee to subsequently challenge the said condition on the ground that it was illegal and not binding and that the assessee was entitled to depreciation for the period of 5 months for assessment year 1982-83?

2. Learned Standing Counsel for the Central Government Shri B.B. Nayak has appeared for the revenue whereas nobody has appeared for the respondent assessee, though the respondent assessee has been served with the notice of this court.

3. The circumstances in which the questions have been referred to this court are as under :

4. The assessee was following the financial year as its accounting year up to Assessment Year 1981-82. On 12th November 1991, the assessee made a request for changing the previous year so as to make the previous year ending on 31st August instead of 31st March. The Income-tax Officer granted the permission subject to the following condition :

"Depreciation claim will not be allowed for the period of 5 months i.e. for the assessment year 1982-83 and that full depreciation will be allowed for the assessment year 1983-84."

Though the assessee initially agreed to the said condition, subsequently he made a claim for depreciation

for the said period of 5 months. According to the assessee, the condition, which had been imposed by the ITO, was illegal. The assessee had relied upon the judgment delivered in the case of J.K. Synthetics Ltd. v. O.S. Bajpai, Income-tax Office, Central Circle V, Kanpur and Anr., 105 ITR 864 (All.) to substantiate his case before the ITO.

5. The Assessing Officer did not allow the amount of depreciation for the said period of 5 months and, therefore, being aggrieved by the assessment order, the assessee filed an appeal before the CIT (Appeals). The CIT (Appeals) dismissed the appeal by observing that if the assessee was aggrieved by imposition of the condition, the assessee should have either challenged the validity of the order imposing the condition by filing an appeal or by filing a writ petition before the High Court. In the circumstances, the CIT(Appeals) confirmed the assessment order. The assessee thereupon challenged the validity of the order passed by the CIT (Appeals) for the A.Y. 1982-83 before the Tribunal.

6. The Tribunal allowed the appeal on the ground that the condition imposed by the ITO was beyond his powers and, therefore, the condition imposed by the ITO was illegal.

7. Shri B.B. Nayak, learned Standing Counsel for the Central Government, has submitted that the order of the Tribunal is not proper. He has tried to support the view expressed by the Assessing Officer as well as the CIT (Appeals).

8. Upon hearing the learned counsel and upon perusal of the orders passed by the revenue authorities and the Tribunal, we are of the view that the order passed by the Tribunal cannot be interfered with. We are in agreement with the view expressed by the Tribunal that the condition, which was incorporated in the order whereby the previous year was permitted to be changed, was not just and proper. The Tribunal was justified in observing that the condition imposed was not in consonance with the object of the Act. We are of the view that the assessee could not have been deprived of its right to claim expenditure in the nature of depreciation, which the assessee is entitled to as per the provisions of the Act. While calculating the income arising under the head "income from profits and gains of business", the assessee is entitled to claim depreciation. It would be neither just nor legal on the part of the ITO to impose a condition which would be violative of the provisions of

the Act, or, in other words, which would deprive the assessee of the benefits of exemptions or deductions, which the assessee is entitled to under the provisions of the Act.

9. The assessee has rightly relied upon the judgment delivered in the case of J.K. Synthetics (supra), wherein it has been held that the condition, which might be imposed by the authority, should be legal and reasonable.

10. In our opinion, when a discretionary power has been given to an authority like the ITO or an assessing officer, he should exercise his discretionary power in a reasonable manner. In the instant case, the discretionary power with regard to permitting change of previous year was exercised by the ITO in an arbitrary manner. Moreover, by virtue of the condition imposed by the ITO, the assessee was deprived of the benefit given to it under the statute and, therefore, the said exercise of power was not in consonance with the provisions of the Act. Such a condition could not have been imposed by the ITO. Simply because the assessee did not challenge the validity of such an unreasonable and arbitrary order at an initial stage, it would not deprive the assessee of its right to claim depreciation, the right which has been given to him under the statute. In our opinion, the order passed by the Assessing Officer depriving the assessee of its right to claim depreciation for the period of 5 months was not proper and the order passed in appeal by the CIT (Appeals) was also not justified. We are in agreement with the view expressed by the Tribunal and the view expressed by the Allahabad High Court in the case of J.K. Synthetics (supra).

11. For the aforesaid reasons, we answer both the questions referred to this court in the affirmative i.e. in favour of the assessee and against the revenue.

The reference stands disposed of accordingly with no order as to costs.

(A.R. Dave, J.)

(K.M. Mehta, J.)

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